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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 JAMES REINHOLTZ,

13 Plaintiff,

14 vs.

15 SELECT PORTFOLIO SERVICING;
16 WELLS FARGO BANK, N.A., as the
17 successor in interest of the loan originated by
18 FIRST FRANKLIN, A Division of National
19 City Bank; FIRST AMERICAN
20 LOANSTAR TRUSTEE SERVICES; and
21 DOES 1 to 10, inclusive,

22 Defendant.

CASE NO. 09-CV-0166 MMA (LSP)

**TEMPORARY RESTRAINING
ORDER**

[Doc. No. 4]

23 Pending before the Court is Plaintiff's ex parte motion for temporary restraining order.

24 [Doc. No. 4].

25 **Background**

26 In 2004, Plaintiff purchased his home on Geiger Court, in Chula Vista, Calif. The lender at
27 the time was Downey Savings and Loan Association. *Ex Parte Mot. for TRO* [Doc. No. 4] at
28 4:6–13. In 2005, he refinanced his loan through Guaranty Bank, and got a loan in the sum of
\$805,000, and a revolving line of credit secured with the house from National City Bank, in the
sum of \$200,000. *Id.* In August of 2006, Plaintiff refinanced the loan on his house through First
Franklin Bank, and was approved for a loan in the sum of \$1,024,000. *Id.* At some point,
Defendant SPS became the loan servicer. *Id.* at 2:14–17. Plaintiff discovered in December 2008,

1 that First Franklin had either transferred or sold its interest in the loan to Wells Fargo Bank. *Id.* at
 2 4:25–5:7. Plaintiff defaulted on the loan in mid-2008 and was served notice of default. *Compl.*
 3 [Doc. No. 1] at 5:14–20. In December 2008, Plaintiff arranged for a short-sale, in which the third-
 4 party buyer offered to pay \$460,000 for the property. Wells Fargo, however, informed Plaintiff
 5 that it would not accept a short sale for less than \$540,000. *Ex Parte Mot. for TRO* at 4:25–5:18.

6 On January 15, 2009, Plaintiff attempted to enter into a modification of the subject loan
 7 with SPS as Wells Fargo’s representative, but SPS refused to consider a loan modification. *Id.* at
 8 5:20–27. On January 16, 2009, Plaintiff received a letter from SPS indicating that it would be
 9 willing to accept \$486,000 in lieu of the \$1,060,050.64 owed to release “its” lien on the property.
 10 *Ex. B to Ex Parte Mot. for TRO* [Doc. No. 4] at 24. Plaintiff was unable to pay the amount set forth
 11 in the letter. Defendants have set a Trustee’s sale for February 5, 2009, at 10 a.m. to foreclose on
 12 Plaintiff’s home. *Ex. A to Ex Parte Mot. for TRO* [Doc. No. 4] at 23.

13 On January 28, 2009, Plaintiff filed a complaint alleging various violations under the
 14 Truth-In-Lending Act 15 U.S.C. § 1601, et seq., California’s Business and Professions Code §
 15 17200, et seq., and 12 U.S.C. § 2605, et seq. [Doc. No. 1]. Plaintiff also seeks relief for Fraudulent
 16 Omission and to Quiet Title. *Id.*

17 On February 3, 2009, Plaintiff filed its Ex Parte Motion for Temporary Restraining Order
 18 (“TRO”). [Doc. No. 4]. In the application, Plaintiff seeks to enjoin Defendants from foreclosing on
 19 his house, to compel production of various documents, and to compel Defendants to show cause
 20 why a preliminary injunction should not be granted in favor of Plaintiff, enjoining foreclosure or
 21 sale of Plaintiff’s property during the pendency of this lawsuit. *Ex Parte Mot. for TRO* at 2:5–22.

22 On February 4, 2009 at 3:30 p.m., the Court held a hearing on Plaintiff’s Ex Parte Motion
 23 for TRO.

24 **Standard of Review**

25 Rule 65(b) of the Federal Rules of Civil Procedure provides that a court may issue a TRO
 26 without notice to the adverse party where “specific facts in an affidavit or a verified complaint
 27 clearly show that immediate and irreparable injury, loss, or damage will result to the movant”
 28 FED. R. CIV. P. 65(b)(1)(A). The movant must also certify in writing any efforts made to give

1 notice and the reasons why it should not be required. FED. R. CIV. P. 65(b)(1)(B). Although the
 2 restrictions imposed are stringent, these restrictions “reflect the fact that our entire jurisprudence
 3 runs counter to the notion of court action taken before reasonable notice and an opportunity to be
 4 heard has been granted both sides of a dispute.” *Granny Goose Foods, Inc. v. Bhd. of Teamsters &*
 5 *Auto Truck Drivers*, 415 U.S. 423, 438–39 (1974).

6 The standard for issuing a TRO is similar to the standard for issuing a preliminary
 7 injunction and requires that the party seeking relief show either “(1) a combination of likelihood of
 8 success on the merits and the possibility of irreparable harm, or (2) that serious questions going to
 9 the merits are raised and the balance of hardships tips sharply in favor of the moving party.”
 10 *Homeowners Against the Unfair Initiative v. Calif. Building Industry Assoc.*, Civil No. 06CV152
 11 JAH (WMc), 2006 U.S. Dist. LEXIS 97023, *4 (S.D. Cal. Jan. 26, 2006) (citing *Immigrant*
 12 *Assistance Project of the L.A. County of Fed’n of Labor v. INS*, 306 F.3d 842, 873 (9th Cir. 2002)).
 13 “[T]hese two formulations represent two points on a sliding scale in which the required degree of
 14 irreparable harm increases as the probability of success decreases.” *Dep’t Parks & Rec. of Calif.*
 15 *v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1123 (9th Cir. 2006) (citations omitted). The
 16 underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a
 17 preliminary injunction hearing may be held. *Granny Goose Foods*, 415 U.S. at 439 (1974); *see*
 18 *also Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

19 Analysis

20 The Truth-In-Lending Act (“TILA”), which is contained in Title I of the Consumer Credit
 21 Protection Act, as amended (15 U.S.C. § 1601, et seq.), is intended to assure a meaningful
 22 disclosure of credit terms so that consumers can compare more readily various available terms and
 23 avoid the uninformed use of credit. 15 U.S.C. § 1601(a). TILA requires that creditors disclose to
 24 borrowers specific information, including finance charges, annual percentage rate, and the right to
 25 rescind a transaction. *See, e.g.*, 15 U.S.C. §§ 1635, 1638. Regulation Z, 12 C.F.R. Part 226, is
 26 issued by the Board of Governors of the Federal Reserve System to implement TILA. *See* 12
 27 C.F.R. § 226.1(a).

28 **1. Notice**

1 Plaintiff provides an affidavit by his attorney, in which the attorney demonstrates the
 2 attempts to give notice to Defendants via fax. Plaintiff has provided fax cover sheets in support of
 3 the notice requirement. The Court finds that Plaintiff has sufficiently demonstrated the actions
 4 taken to serve Defendants with notice of his application for TRO.

5 **2. Irreparable Harm**

6 Plaintiff is set to lose his home tomorrow at a foreclosure sale. Plaintiff contends that he
 7 will suffer irreparable harm because his residence is his primary residence. Plaintiff asserts that he
 8 has lived in the house for almost five years, during which time it has become a home rather than
 9 “just another piece of property.” Plaintiff contends that if his home is sold at a foreclosure sale, he
 10 will be homeless, a prospect for which he is not prepared. *Ex Parte Mot. for TRO* at 7:2–22.
 11 In addition, the Court is satisfied that Plaintiff has sought relief in the form of a TRO in a diligent
 12 manner. Plaintiff was notified of the foreclosure sale on January 7, 2009. Plaintiff subsequently
 13 contacted SPS to see if he could modify the loan. SPS declined, but then sent Plaintiff a letter on
 14 January 16, 2009, stating that it would accept payment of \$486,000.00 in satisfaction of the loan if
 15 paid by January 30, 2009. On January 28, 2009, when it became apparent that Plaintiff could not
 16 come up with the funds and the parties could not negotiate any other remedies, Plaintiff filed the
 17 complaint. On February 3, 2009, Plaintiff filed the ex parte application for a TRO .

18 Plaintiff has demonstrated a showing of irreparable harm, that is strong—for Plaintiff to
 19 lose his house tomorrow would present a far greater hardship than postponing the foreclosure sale
 20 for a ten-day period to allow for an additional hearing and further briefing (especially since the
 21 Defendants have not had an opportunity to oppose Plaintiff’s application in writing or otherwise).

22 **2. Likelihood of Success on the Merits**

23 Because the balance of hardships so clearly points in Plaintiff’s direction, Plaintiff is
 24 allowed to make a lesser showing on the merits. *See Johnson v. Cal. State Bd. of Accountancy*, 72
 25 F.3d 1427, 1430 (9th Cir. 1995) (holding that where balance of hardships tips sharply in plaintiff’s
 26 favor, plaintiff need only show “fair chance of success on the merits”). Plaintiff contends that he
 27 has demonstrated violations of TILA and other various provisions for which he seeks relief, which
 28 shows a likelihood of success on the merits. Plaintiff has alleged facts in the verified complaint

1 and the Ex Parte Motion for TRO that show a “fair chance of success on the merits” because
 2 Plaintiff’s facts tend to show that Defendants committed various TILA violations, entitling him to
 3 rescission. There are serious questions, however, concerning whether Plaintiff’s claims regarding
 4 Defendants standing under the “original title” theory have any merit based on recent cases dealing
 5 with this issue. For the time being, however, the Court finds that Plaintiff’s allegations on the
 6 merits are sufficient to grant the temporary restraining order.

7 Having balanced the hardships with the likelihood of success on the merits, the Court finds
 8 that the inquiry tips in favor of Plaintiff. Accordingly, Plaintiff’s Ex Parte Motion for TRO is
 9 hereby **GRANTED**.¹

10 **3. Bond Requirement**

11 Rule 65(c) states: “The Court may issue a preliminary injunction or a temporary restraining
 12 order only if the movant gives security in an amount that the court considers proper to pay the
 13 costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”
 14 Fed. R. Civ. P. 65(c). Here, Plaintiff asserts that a bond should not be required because
 15 “defendants are protected by the security interest they hold on plaintiff’s home.” Plaintiff,
 16 however, has failed to demonstrate that there is equity sufficient to pay the costs and damages if
 17 the TRO is ultimately found to be improper. Accordingly, the Court requires that Plaintiff post a
 18 cash bond of **\$5,000.00**. This Order shall not become effective until the bond is paid in accordance
 19 with Southern District of California Local Civil Rule 65.1.2.

20 In conclusion, the Court hereby **ORDERS**:

21 (1) All Defendants and their agents, assigns, employees, officers, attorneys, and
 22 representatives are enjoined and restrained from engaging in or performing any act to deprive
 23 Plaintiff of ownership or possession of the real property located at 2671 Geiger Creek Court,
 24 Chula Vista, California 91915 (“Property”), including but not limited to instituting, prosecuting or
 25 maintaining foreclosure or sale proceedings on the Property, from recording any deeds or

27 ¹The Court, however, does not find good cause to order production of the documents listed in
 28 page 2 of Plaintiff’s motion for TRO. To the extent Plaintiff continues to seek these documents, the
 Court finds that an order compelling such production is not appropriate at this point in the
 proceedings.

1 mortgages regarding the Property or from otherwise taking any steps whatsoever to deprive
2 Plaintiff of ownership in the Property, and in particular from proceeding with the sale of the
3 Property scheduled for February 5, 2009.

4 (2) This temporary restraining order shall be binding upon the parties to this action and all
5 other persons or entities who receive actual notice of this order by personal service or other
6 acceptable means of service.

7 (3) With respect to all Defendants, Plaintiffs shall serve all Defendants with a copy of this
8 Order no later than February 9, 2009, together with all other documentation filed with the Court in
9 this action.

10 (4) This temporary restraining order is entered this 4th day of February, 2009 at 6:15 p.m.


11 (5) A hearing on Plaintiff's motion for preliminary injunction is set for February 19, 2009
12 at **10 a.m.** in Courtroom 5.

13 (6) By February 13, 2009, Defendants shall submit brief(s)² in opposition to the
14 preliminary injunction. Any brief **SHALL NOT EXCEED** twenty-five (25) pages.

15 (7) By February 17, 2009, Plaintiff shall submit a reply to the opposition, if any, and it
16 **SHALL NOT EXCEED** ten (10) pages.

17 **IT IS SO ORDERED.**

18 DATED: February 4, 2009

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20 Hon. Michael M. Anello
21 United States District Judge

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²Defendants may jointly submit one brief on behalf of all Defendants, or three separate briefs
on behalf of each Defendant.